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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1415

IRVING STERN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Comes now Raymond Bernhard Grunewald, attorney for the petitioner, and hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is at this time unreported. It is set forth in the Appendix at pp. 1a *et seq.* The oral findings and opinion of the United States District Court, Southern District of New York are unreported.

Jurisdiction

The judgment of the panel of the Court of Appeals was entered on March 12, 1975. A timely petition for rehearing

was denied on April 16, 1975. This petition is filed within thirty (30) days of the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Invoked

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

"No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . ."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Statute

§ 3731, Title 18, United States Code:

• • •

> "An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence . . . in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment . . . if the United States Attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."

• • •

Questions Presented

1. May statements made in confidence to a lawyer, by an individual seeking legal assistance and whose statements were secretly tape recorded by the lawyer and later turned over to government agents, be utilized against the individual?

2. Absent clear error in its finding of privileged communication, may the decision of the United States District Court which actually heard and evaluated the testimony of the participants, read the transcripts and heard the unauthorized tape recording made by the attorney of the petitioner who had confided in him, be reversed upon the government's appeal pursuant to § 3731, Title 18, U.S.C.?

Statement of the Case

On March 21, 1974, petitioner Irving Stern and other officers of Local 342, Amalgamated Butcher Workmen of North America, were indicted in the Southern District of New York and charged with violations of §§ 1962(c) and 1962(d), Title 18, U.S.C., §§ 186(a) and 186(b), Title 29, U.S.C. and §§ 7201 and 7206(1), Title 26, U.S.C.

As a result of discovery motions petitioner listened to a tape recording and received a transcript of an unauthorized taping of conversations he had held with an attorney while consulting with the latter. On August 26, 1974, petitioner Irving Stern moved to suppress from use as evidence upon the trial of the indictment, any conversation between Irving Stern and an attorney at law, one Walter H. Bodenstein, Esq., and any leads obtained therefrom on the grounds that such conversation was privileged, that the unauthorized revelation of such conversation

and the information contained in it was in violation of the recognized protections afforded persons in an attorney-client relationship, and that its acquisition and projected use were in derogation and contravention of petitioner's rights under the United States Constitution.

A. The Suppression Hearing

On November 18th and 19th, 1974, petitioner's motion to suppress was heard before the United States District Court. Irving Stern called attorney Bodenstein to testify. (HR. 25)[1]

Walter Bodenstein testified that he was admitted to the bar of the State of New York for fourteen (14) years and maintains offices in New York County for the practice of law. (HR. 25-27) In March 1973 he had been indicted on corporation income tax charges in the United States District Court, Southern District of New York, together with his father-in-law, one Moe Steinman,[2] and an uncle. The indictment, although still pending, is to be nolle prosequi pursuant to a letter agreement dated August 14, 1973 between Bodenstein's counsel, Steinman's counsel, other counsel and the same attorney for the government prosecuting petitioner's case. (HR. 28-36) Although Bodenstein professed, in essence, that his turning over of the tape to government agents was unrelated and a voluntary act of his part,[3] remarkably enough the tape record-

---

[1] Reference Key: Tr.—Tape transcript record; HR.—Hearing record; A.—Appendix.

[2] Moe Steinman was, until recently, the Labor Relations Director for the Daitch-Shopwell supermarket chain. Stern knew him for many years. (Hr. 161-162)

[3] When asked by government counsel if *he* disclosed to the government the existence of the tape prior to the August 14, 1973 nolle prosequi agreement, Bodenstein's answer was "I *think* not." In any event *delivery* was after the event. (HR. 90)

ing was at the suggestion of counsel for his father-in-law and the agreement to nolle prosequi the indictment was negotiated and agreed to by the same attorney, together with co-counsel, and only then was the tape turned over. (HR. 27-31; HR. 33-37; HR. 48-49; HR. 95; HR. 99-101; HR. 136-137) When the tape recording was made, and conversations held, no one was present but petitioner and Bodenstein. Petitioner did not know that the conversation was being recorded and never authorized it. (HR. 31-32; HR. 44-45)

Bodenstein had (as reflected in the tape transcript) an unrecorded conversation with petitioner approximately one week to ten (10) days prior to the taped conversation of May 18, 1973. Stern had given him financial data as to past financial dealings and requested Bodenstein's assistance. At no time did Bodenstein ever state to Stern that petitioner's discussions did not come within the attorney-client privilege or that he would reveal it to others. In his questioning of Stern, Bodenstein followed the same legal interrogation practices that a general law practitioner utilized in securing information to turn over a legal specialist or to determine what legal specialist to use.[4] Bodenstein sought to draw out, on May 18, 1973, the same information that Stern had imparted the previous week. Bodenstein, confronted with the tape transcript, admittedly gave Stern advice as to securing a tax lawyer but denied he did so the previous week. (HR. 46-48; HR. 50-54; HR. 79; HR. 58-59)

Bodenstein understood that Stern was seeking to obtain additional counsel. (HR. 63) He knew, from prior discus-

[4] The Trial Court stated that this type of information was "privileged on its face." (HR. 51; HR. 266-267) In fact Bodenstein, in relation to his own income tax problems, utilized the same method with regard to himself in securing a tax expert! (HR. 140-142)

sion with petitioner, that Stern had "a tax problem that he did not know how to handle." (HR. 65) Bodenstein was not engaged in attempting to aid and assist in the commission of any crime during the course of their conversation. (HR. 69) He was arranging for Stern to discuss petitioner's tax problem with a Mr. Bender, an acknowledged tax law specialist. The problem discussed, both on May 18, 1973, and prior thereto, dealt with the utilization of certain bonds by petitioner as collateral. He knew Stern was concerned about the implications of such bonds from a tax point of view. Stern had given him a great many factual particulars in confidential discussions preceding the May 18, 1973 taped discussion. (HR. 70-73; HR. 76-80)

On cross-examination Bodenstein stated he never *represented* petitioner in any legal proceedings. Nor did he receive a fee. He denied that he acted as lawyer with Stern as a client. On redirect, he admitted that he had had clients come to him without a fee and whom he ultimately didn't represent. (HR. 136)

The Trial Court elicited the acknowledgment from Bodenstein that at least part of Bodenstein's ostensible purpose in discussions with Stern was to help find a solution to Stern's problems that had been talked about on earlier occasions and that it was from *a legal standpoint.* Part of this was for Bodenstein to help in arranging for an appointment with specialist counsel. Bodenstein described Stern as a man who was highly upset, agitated, had lost his composure and was distraught by the precarious state of his wife's health. (HR. 116-117; HR. 119) Bodenstein suggested that Stern was irrational at this time.[5] (HR. 127)

Irving Stern testified in his own behalf. Director of Organization for Local 342, Amalgamated Meat Cutters

[5] Stern was under medication (Vallium, a tranquilizer) and it obviously impaired his mental faculties. (HR. 258-259)

and Butcher Workmen of North America, and a vice-president of the International, over a period of some seventeen to eighteen years, he had met and dealt with attorneys. Although he solicited their legal advice, he did not always pay a fee. But one thing he knew and relied on: that seeking advice from and consulting with an attorney about personal legal problems was confidential and privileged. Just prior to conversing with attorney Bodenstein in April and May of 1973, Stern had been particularly advised, by another lawyer, about discussing his personal legal problems only with attorneys because of the client-lawyer relationship, confidentiality and ensuing privilege. (HR. 148-151)

Stern stated that Walter Bodenstein had contacted him around July 1972 with respect to an investigation in the meat industry and was told that his name had been mentioned. As rumor persisted, Stern kept in touch with Bodenstein. Stern had previous contacts with Bodenstein with respect to legal matters when Bodenstein represented others. (HR. 152-154; HR. 156-158)

Stern solicited Bodenstein's advice, as an attorney, with respect to past financial dealings in stock transactions. Prior to May 18, 1973, Bodenstein had repetitively assured him that since Stern came to him as an attorney for legal advice, his confidences, were protected. Petitioner was gravely concerned about his reputation, fearing any implication of wrongdoing, and wanted absolute confidentiality. When Stern received a notice from the Internal Revenue Service in March 1973 he became extremely upset. He, thereafter, consulted with several lawyers including Walter Bodenstein. He offered to pay Bodenstein a fee but was told it wasn't necessary.[6] Stern felt Bodenstein was knowl-

[6] Stern's assertion of fee offers, stated in his moving papers and at the hearing, *were never contradicted*. The government chose to stress only that a fee was not paid. The Trial Court noted its lack of relevance. (HR. 218)

edgable with respect to tax difficulties and especially since Bodenstein had experienced such problems personally. Bodenstein had opined, on an earlier occasion, that *perhaps* he might not be able to actually represent Stern, but perhaps he would secure other counsel. On a particular New York State investigation matter, involving representation before a Grand Jury, Bodenstein declined "representing" Stern because he felt it was improper. (HR. 161-163; HR. 167-172; HR. 179-180; HR. 203; HR. 208-211; HR. 227-228)

On the occasion prior to the tape recorded conversation of May 18, 1973, petitioner had come to Bodenstein to seek legal advice on what Stern conceived to be a serious tax problem involving his past personal finances. Bodenstein obtained the particulars and advised petitioner with respect to securing further particulars. The need for additional and specialist counsel was discussed. Bodenstein assured Stern that their conversation was confidential. Whenever any third party appeared the discussion would cease. The transcript of May 18, 1973 reflected a portion of the factual information furnished prior thereto. Stern sought Bodenstein's assistance in obtaining special counsel in tax matters and gave him the necessary background information. (HR. 192-196; HR. 198; HR. 199-202; HR. 228; HR. 260)

Bodenstein actually did arrange an appointment between Stern and tax specialist Louis Bender. Stern then consulted with Bender about his anticipated legal difficulties from a tax and otherwise related viewpoint. (HR. 247-251)

B. The Tape Transcript

Analysis of the transcript of the taped conversation (excluding the vulgarities of speech and other similar banalities) of the May 18, 1973, reveal an initial conversation by attorney Bodenstein, acknowledging a prior discussion with

petitioner on the week previous; Bodenstein's comments on and concerns about "Iowa Beef", and petitioner's generally brief responses (TR. 2-3), immediately followed up by attorney Bodenstein eliciting factual financial data concerning bonds from petitioner Stern and Stern's comments on records and the like. Attorney Bodenstein then advised ". . . what we've got to do. You've got an exposure with these . . . things . . ." and ". . . let me tell you what I think ought to be done as a first step." (TR. 3-5) Then there was a discussion as to where should Stern go for top flight income tax advice from outstanding tax specialists at the New York bar, such as Kostelanetz and Bender. Attorney Bodenstein, having secured background factual details, then undertook to set up an appointment with a leading tax specialist, Lou Bender, Stern expressed great fear that moneys will be *falsely* ascribed to him as products of illegal dealings. (TR. 6-8) Bodenstein offered to assist by posing the problem without even mentioning petitioner's name. He assured Stern that he knew the situation totally since Stern has given him the necessary facts and he will relay the factual situation to the tax law expert. (TR. 9)

Stern, a shaken man, repetitively expressed his fear of false accusation of hidden money and his fear of being unable to satisfactorily explain his financial dealings. He spoke of what he thought someone might suggest to him as an explanation but, as Stern stated ". . . I don't know. I don't know. There's got to be an answer. I just can't have a no answer." As he did so, attorney Bodenstein reassured him that he would solicit the best tax counsel advice. (TR. 10-12; A. 26-29) As Stern phrased it to attorney Bodenstein . . . "I'm turning . . . in desperation for some advice of, cause I'm much afraid of talking and much afraid. *The only one I really consulted*, that knows the whole goddamned thing, you know, *is you.*" A few sentences earlier, attorney Bodenstein had stated: ". . . I think I know the

answer *as a lawyer,"* to which Stern then responded, *"As an attorney* you know the answer." (TR. 12)

C. The District Court Findings and Ruling

On November 19, 1974, the United States District Court found that an attorney-client privilege did exist with respect to Stern's conversations with attorney Bodenstein and ruled that the petitioner's motion to suppress was granted as to substantial parts of the tape and transcript. (HR. 261-267; HR. 307-311) Furthermore, any similar Stern-Bodenstein discussions, *i.e.*, financial transactions, would have a similar ruling, and any attempt at offering evidence of the same would require an appropriate ruling. (HR. 271)

In arriving at its conclusion, the District Court initially made a series of observations:

> (1) That the relationship between attorney Bodenstein and Stern originated in other than an attorney-client relationship and that the relationship (even as of May 18, 1973) *may* have had several aspects, which could be delineated. (HR. 261)
>
> (2) That Stern did go to attorney Bodenstein to further consult with a reputable criminal tax attorney. (HR. 261)
>
> (3) That the fact was that, in seeking advice as to where to go for specialized tax advice, Stern did utilize an attorney, Bodenstein. (HR. 261)
>
> (4) That the information given to Bodenstein as an attorney or as an attorney-agent for the purposes of conveying it to a specialist attorney was protected by the attorney-client privilege. (HR. 262-263)
>
> (5) That a person can seek legal advice from a lawyer without any clear idea of what the lawyer

can do for him and success is not the criteria on the issue of privilege. (HR. 264)

(6) Desire of the client to remain anonymous to the specialist attorney doesn't destroy the privilege. (HR. 264)

(7) Possible thoughts by the client about possible fabrication doesn't destroy the privilege. (HR. 264-265)

(8) Attorney Bodenstein's eliciting of facts from petitioner Stern was lawyer-like and Stern gave the information for the purpose of securing legal advice. (HR. 267)

After listening to the witnesses, government counsel's arguments, posing numerous hypothetical questions, weighing the facts, credibility, Stern's testimony *vis a vis* Bodenstein, (HR. 306-310) the District Court further amplified and stated:

> "Therefore, I would hold . . . the weight of the evidence is that in this conversation Mr. Stern was speaking to Mr. Bodenstein *as an attorney* . . ."
>
> ". . . it does seem to me clear that Mr. Bodenstein was more than merely an intermediary. The confidences would not have been given to him, it seems to me, without the belief on the part of Mr. Stern that he was giving them to someone who could have the judgments that are associated with attorneys." (HR. 310-311)

On November 21, 1974 the government filed a notice of appeal pursuant to § 3731, Title 18, U.S.C., from the decision of the United States District Court, Southern Dis-

trict of New York, and on November 22, 1974, obtained a stay of the trial pending determination of its appeal upon the certification by the United States Attorney that the appeal was not taken for the purpose of delay and that the evidence involved is a substantial proof of fact material to the proceeding.

On January 13, 1975 the appeal was argued and on March 12th, 1975, the United States Court of Appeals for the Second Circuit handed down an opinion reversing the order of the United States District Court, Southern District of New York. (A. 1a-10a) On April 16th, 1975, a petition for a re-hearing was denied. (A. 11a). On May 2, 1975, a motion to stay the mandate pending application for certiorari, was denied. (A. 12a).

Reasons for Granting the Writ

The present scope of the attorney-client privilege and the procedures by which that privilege is protected constitute an important area of Federal Law upon which there has been no Supreme Court pronouncement for a protracted period, *i.e. Alexander* v. *United States*, 138 U.S. 353 (1891). The recently enacted Federal Evidence Code shied away from codifying a definition of the attorney-client privilege and, therefore, it would be seemly that enlightenment should come, at this time, from the Supreme Court of the United States. It is all the more important to have a definitive resolution of these questions because of the recent highly publicized events which have tended to bring the legal profession, a vital segment of our society, into public disrepute. That is to say, the public is entitled to a pronouncement from the United States Supreme Court as to whether or not depredations of counsel, such as

attorney Bodenstein in this case, are to have the tacit approval of the Federal Courts because an evidentiary benefit inures to the prosecution. The public is entitled to know whether there is broad legal protection for confidences, albeit misplaced, bestowed upon members of the legal profession, or whether the public at large is to be relegated to the societally undermining and destructive position of a rule that confiding in legal counsel is at the individual's own peril if the attorney's hidden purpose is their subsequent betrayal.

POINT I

Statements made in confidence to an attorney, in the course of private consultations with him as an attorney, and which were, unknown to the client, surreptitiously tape-recorded by the attorney, are privileged and, absent proof of explicit consent to reveal by the client, are not subject to disclosure and their employment, and leads obtained from them, must be suppressed.

Irving Stern, a layman, under medication, and in a state of intense personal turmoil, went to Walter Bodenstein, an attorney known to Stern as such, and consulted with him in confidence about anticipated legal problems. He had consulted with him in the past without a fee payment. The May 18, 1973 conversation, secretly recorded by Bodenstein, revealed Bodenstein referring to his role as a "lawyer" (TR. 12; A. 29) and Stern confirming "As an attorney you know the answer" (*Id.*) Although Stern had retained another lawyer to represent him formally with the Internal Revenue Service, he expressed to Bodenstein, "The only one I really consulted, that knows the whole goddamned thing, you know, is you". The upshot of the meeting was the arrangement of an appointment with a reputable tax law specialist. The

District Court concluded that Stern's purpose was to confide in an attorney-client relationship.

In *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888), this Court plainly stated:

> "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. ***But the privilege is that of the client alone.*** . . ." [Emphasis supplied]

Thus only the client can waive the privilege, not the attorney. The latter occupies the position of the priest to the penintent. In our society it has always been so and for reasons that are self-obvious.

No formal language of retainer is required to establish an attorney-client relationship. A person who comes to an attorney, whom he knows to be an attorney, and to whom he reveals confidential matters that had occurred previously and about which he was concerned, has the absolute right to rely on an attorney-client relationship. *Alexander* v. *United States*, 138 U.S. 353 (1891). As this Court phrased it, *id* at 358, in reversing a murder conviction because of the admission into evidence of factual data related by a defendant to an attorney, apparently prior to formal charges and without payment of a fee:

> "If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, ***neither the payment of a fee***

nor the pendency of litigation was necessary to entitle him to the privilege. Williams v. *Fitch*, 18 N.Y. 546; *Britton* v. *Lorenz*, 45 N.Y. 51; *Bacon* v. *Frisbie*, 80 N.Y. 394; *Andrews* v. *Simms*, 33 Arkansas, 771. [Emphasis supplied]

"In the language of Mr. Justice Story, speaking for this court in *Chirac* v. *Reinicker*, 11 Wheat, 280, 294: 'Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.' "

Confidential communications between client and attorney were privileged under common law; the rule is of ancient origin. *Baird* v. *Koerner*, 279 F.2d 623 (9th Cir. 1960). As stated by the Court in *Baird*, at 629, 635:

"... The doctrine is based on public policy. While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer."

• • • • •

"As has been said,

[I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may

> safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it * * * United States v. Costen, C.C.D. Colo. 1889, 28 F.24 (opinion by Mr. Justice Brewer, then Circuit Judge.)."

The fact that there were other attorneys representing the clients at the time he consulted with other counsel is inconsequential and immaterial. *Baird* v. *Koerner, id* at 635. And it is beside the point that the attorney did not receive a fee or accept a retainer. *Alexander* v. *United States, Ibid; Robinson* v. *United States,* 144 F.2d 392, 405 (6th Cir. 1944), *cert. denied,* 323 U.S. 789 (1944), *aff'd. on other grounds,* 324 U.S. 282 (1945), *reh. denied,* 324 U.S. 889 (1945), *reh. denied,* 325 U.S. 895 (1945), *motion for leave to file pet. for reh. denied,* 326 U.S. 807 (1945).

While the burden of establishing the existence of the relationship rests on the claimant of the privilege against disclosure, *United States* v. *Kovel,* 296 F.2d 918 (2d Cir. 1961), the Second Circuit, in the case entitled *In* re *Bonanno,* 344 F.2d 830, 833 (2d Cir. 1965) stated:

> "We recognize that an attorney-client relationship arises when legal advice *of any kind* is sought from a professional legal adviser in his capacity as such. 8 Wigmore, Evidence (McNaughton Rev. 1961), § 2292." [Emphasis supplied]

In *United States* v. *Kovel, id* at 921, the Second Circuit noted the accepted test "of Wigmore's famous formulation", the classic statement of attorney-client privilege as stated by Wigmore in VIII (3d Ed. 1940) § 2292:

> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity

> as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived . . ."

In *United States* v. *Kovel,* 296 F.2d 918 (2d Cir. 1961), in upholding as privileged, under the circumstances, communications to a non-lawyer (accountant) by the lawyer's client, the Court observed with respect to such communications:

> "'That, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man * * * should have recourse to the assistance of professional lawyers, and * * * it is equally necessary * * * that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret * * *,' Jessel, M.R. in Anderson v. Bank, 2 Ch.D. 644, 649 (1876).'"

By analogy to the overall reasoning espoused in *Kovel,* it would seem that where a person communicates factual data *to a lawyer* for communication and discussion with another specialist-lawyer, that the privilege exists by virtue of the agency when coupled with the professional status of the recipient of the information. Again, in *Continental Oil Co.* v. *United States,* 330 F.2d 347 (9th Cir. 1964), pooled general information needed to apprize the parties of their status, even though exchanged in the presence of non-lawyer co-defendants and their counsel, did not diminish the privileged nature of the communications. See also, *Hunydee* v. *United States,* 355 F.2d 183 (9th Cir. 1965).

Irving Stern, the asserted holder of the privilege not only sought to become a client, for the purposes of his conversation, he *was* a client of attorney Bodenstein, the person to whom the communication was made. Bodenstein was a member of the bar and, in connection with this communication, was active as a lawyer. The communication related to financial data and surrounding facts of which attorney Bodenstein was informed by Stern, without the presence of strangers, for the purpose of securing primarily an opinion on tax law, legal services and assistance in an anticipated legal proceeding and definitely not for the purpose of committing a crime or tort, and the privilege was claimed and never waived by Stern.

POINT II

The resolution of a question of privileged communication arising out of an attorney-client relationship, the ascertainment of which is based on factual determinations made by the District Court, is a trial level determination which may not be disturbed, upon an appeal by the government pursuant to § 3731, Title 18, U.S.C., unless clearly erroneous.

It is urged that the factual evidence on an appeal must be reviewed in the light most favorable to the appellee. *Glasser* v. *United States*, 315 U.S. 60, 80 (1943). Generally the government is the appellee. But the principle espoused in *Glasser* is not based upon the identity of the parties but rather on the concept that the appellee sustained his burden of proof at the trial court level and thus enjoys the evidentiary advantage. While the quantum of proof required may be less with respect to the burden imposed at a hearing, *i.e.*, "preponderance of evidence" *vis a vis* "beyond a reasonable doubt", this should not detract from the tradi-

tional appellate view of factual determination made at the District Court level.

The United States District Court, after a two day hearing encompassing testimony as to the events preceding the tape recording, as well as reading the subsequent tape transcript and listening to the tape, found certain portions of the material sought to be suppressed as being within the attorney-client privilege and therefore, suppressable.

The Circuit Court's opinion stated that "A review of the record of the suppression hearing persuades us that there was no basis for concluding that an attorney-client relationship existed between Bodenstein and Stern at the time of the conversations in question." But, it is respectfully urged, the record clearly indicates that the District Court, and trier of the facts, elicited the acknowledgment from attorney Bodenstein himself that at least part of Bodenstein's ostensible purpose in discussions with Stern was to help find a solution to Stern's problems that had been talked about on earlier occasions and that it was from *a legal standpoint*. Part of this was for Bodenstein to help in arranging for an appointment with specialist counsel.

Furthermore, the Circuit Court overlooked the fact that the District Court, the determiner of credibility, had accepted Stern's version of events with respect to many of his contentions, as was inherentnt in its finding that there was an attorney-client relationship. Stern had testified, before the District Court, that *prior* to May 18, 1973 (the date of the tape recording) attorney Bodenstein had repetitively assured Stern that since Stern came to him as an attorney for legal advice his confidences *were* protected. Stern offered to pay Bodenstein a legal fee but was only told that it wasn't necessary, *not* that there was no privileged conversation and that he could not consult with him.

Stern testified that he felt Bodenstein was knowledgeable with respect to tax difficulties and especially since Bodenstein had experienced such problems personally. On the occasion immediately prior to the tape recorded conversation of May 18, 1973, Stern had come to Bodenstein to seek legal advice on what Stern conceived to be a serious tax problem involving his past finances. Bodenstein obtained particulars and advised petitioner with respect to securing further particulars. The need for additional and specialist counsel was discussed. Bodenstein assured Stern that their conversation was confidential.

The record is replete with a factual basis for the District Court's sustaining the petitioner's claim that an attorney-client relationship existed and the District Court, the trier of the facts, so found. In this regard, it is respectfully submitted that the Circuit Court overlooked or misapprehended the general principles asserted in *Glasser* v. *United States*, 315 U.S. 60, 80 (1943) and *Campbell* v. *United States*, 373 U.S. 487, 83 S.Ct. 1356, 1360 (1963), with respect to viewing evidence upon appeal. The government did not contend, nor does the Circuit Court's opinion assert, that the District Court's fact finding in Stern's favor, with respect to attorney-client privliege as to Stern's financial disclosures to attorney Bodenstein, was clearly erroneous. Therefore, it should not have been disturbed. See, *e.g. Campbell* v. *United States, id; United States* v. *Rich*, — F.2d — (2d Cir. 22 Apr. 1975) (*per curiam*), citing *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971) and *United States* v. *Giuliano*, 348 F.2d 217 (2d Cir.), *cert. denied*, 382 U.S. 946 (1965); *United States* v. *Luckett*, 484 F.2d 89, 90 n.1 (9th Cir. 1973) (per curiam). As was orally argued before the panel, the District Court actually heard the testimony of Irving Stern and attorney Bodenstein and

came to its conclusion based on that, which included the facts *preceding* as well as the tape recording itself. Surely the questions resolved by the District Court were ". . . ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous." *Campbell* v. *United States,* 83 S.Ct. 1356, 1360.

It is respectfully contended, although the statement was made in the decision of the Circuit Court that "Nor at argument was counsel able to state what legal advice Stern was seeking," that it *was* stated that the legal advice sought was a legal answer to the financial facts as elicted by Bodenstein from Stern, both *prior* to the tape recording and during it as well, and which Stern, believing his conversations to be privileged, as Stern so testified, furnished to an attorney in the hopes that this would result in some sort of legal assistance.

It is respectfully urged that the Circuit Court overlooked the District Court's specific opinion, not refuted by any evidence or case law in the record, that a person can seek legal advice from a lawyer without any clear idea of what the lawyer can do for him and success is not the criteria on the issue of privilege. Any other criteria would require people consulting with lawyers, confident in *their* minds that their revelations were being kept confidential, to consult at their own peril in the event that the attorney had other motivations or conceptions in *his* mind. But, as stated in *Hunt* v. *Blackman,* 128 U.S. 464, 470 (1888), the privilege is that of the client alone. Thus the motivations of the attorney or his objects are of no consequence. Nor is there any form of language required to establish the relationship. *Alexander* v. *United States,* 138 U.S. 353 (1891). Thus, the content of the conversation, however abhorrent it might be to society, or however sordidly

phrased, has no bearing as to the privilege. The privilege, in essence, protects the subjective beliefs of the person communicating information to an attorney, believing it to be privileged, and even if foolishly hoping for some legal solution to his problem. As the District Court noted, based on its hearing of all of the evidence, the confidences that Stern gave to attorney Bodenstein would not have been given to him ". . . without the belief on the part of Mr. Stern that he was giving them to someone who could have the judgments that are associated with attorneys."

It is further respectfully urged that the Circuit Court misapprehended the validity of the District Court's finding, as noted immediately above, when it commented, with respect to it, that the financial information was elicited from Stern ". . . in direct response to questions by Bodenstein, a potential *co-defendant,* whether he (Bodenstein), his father-in-law, or his business were likely to be implicated in any bribe payments to Stern." [Emphasis supplied], following this observation up with the further observation that "Similarly, Stern's requests for help in choosing expert tax counsel were pleas of a frightened man looking for a solution to his problems *from someone who might be implicated as a co-defendant* if Stern failed to find an explanation for the bonds." [Emphasis supplied] It is respectfully submitted that in this analysis, the Circuit Court erred for, at no time, was there any *evidence* forthcoming which could factually classify Bodenstein as a co-defendant with Irving Stern and particularly with respect to the bonds. It is agreed by all that no payments were ever made to Stern with respect to IBP. And, the indictments returned against Stern do not refer to Bodenstein as a co-defendant or even an unindicted co-defendant. Thus, it is respectfully urged, too great a stress has been placed upon a factual aspect not factual at all. And, there-

fore, the acknowledgment by the Circuit Court "That Bodenstein was an attorney may well have been an additional factor which caused Stern to ask Bodenstein for advice," when coupled with "However it was Bodenstein's status as a *potential co-defendant* under investigation, not as an attorney, which was of paramount importance in their relationship", [Emphasis supplied] is a case where emphasis has, unfortunately and erroneously, been misplaced. It is respectfully submitted that instead of giving due emphasis to the facts found by the District Court, *i.e.* that Bodenstein was an attorney and *this factor* caused Stern to ask Bodenstein for advice, undue emphasis was given to an erroneous conception of fact, *i.e.* that Bodenstein was a "potential co-defendant" under investigation and this was of paramount importance, which is not borne out by evidence in the record.

Absent *clear error* in fact finding with respect to the attorney-client privilege, a contention neither made by the government nor specifically found by the Circuit Court, the District Court's facts and resulting opinion in this regard should have been affirmed.

In sum, it is a misassumption of fact which caused the Circuit Court to give undue emphasis to an aspect which not only has never materialized but never was. Bodenstein, as the record indicates clearly, was a person under investigation with respect to corporate tax cheating as a corporate officer, not personal tax cheating and thus has never been linked up to Irving Stern in any way. Bodenstein was never a "potential co-defendant" of Stern.

The Circuit Court further relied upon the undisputed fact that Bodenstein had refused to represent Stern on other occasions. But, it is respectfully urged, this was a misconception of its significance, for there is nothing in the

record which denies the fact that Bodenstein had permitted Stern to, repetitively, *consult* with him. In fact, it was acknowledged by Bodenstein, and is also undisputed, that the method by which Bodenstein elicited financial details from Stern was the same method that he employed, as an attorney, in eliciting information from persons who were acknowledged clients.

The case of *United States* v. *Kovel,* 296 F.2d 918, (2nd Cir. 1961) did not, as the Circuit Court assumed in its opinion, have the effect of precluding Irving Stern's contention of attorney-client privilege. It is submitted that the Circuit Court in its opinion acknowledged that Stern came to Bodenstein for advice, *i.e.,* "That Bodenstein was an attorney may well have been an additional factor which caused Stern to ask Bodenstein for advice." Therefore, it is respectfully urged that this was, indeed, legal advice of "*any* kind" and the District Court so found. And it is further asserted that it is equally undisputed that the advice was sought from a professional legal advisor and that the conversation shows, and the District Court found, it was given in his capacity as such. It is urged that this is borne out by repeated references, as seen even in the tape transcript itself, to Bodenstein's capacity as an attorney and Stern's statement that Bodenstein was the only one that he had *really* consulted with.

Interwoven in the Circuit Court's consideration of fact and law, as noted previously, is an erroneous application of the principles of *Glasser* v. *United States, supra,* for the evidence on appeal has been accepted from a view most favorable to the government despite the fact that the government was not the appellee, thereby disregarding the weight of the evidence as determined by the District Court, the trier of the facts; and then the Court below misapplied

the law propounded in *Campbell* v. *United States, supra, Hunt* v. *Blackburn, supra,* and *Alexander* v. *United States, supra,* by denying the privilege to a layman who came to a lawyer, who he knew to be a lawyer, and to whom he confided confidential matters that had occurred previously and about which he was grievously concerned, all of which were found to be the facts by the District Court.

CONCLUSION

For the reasons stated above, petitioner's rights under the Constitution and Laws of the United States, were violated. His petition for a Writ of Certiorari should be granted so that this Court can consider the important questions of the scope of attorney-client privilege and the construction of § 3731, Title 18, U.S.C. with respect to the burden of proof to be sustained by the government on appeal from a decision in favor of a defendant at the trial court level.

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 591—September Term, 1974.

(Argued January 13, 1975 Decided March 12, 1975.)

Docket No. 74-2522

UNITED STATES OF AMERICA,

Appellant,

v.

IRVING STERN,

Appellee.

Before:

LUMBARD, FRIENDLY and GURFEIN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Judge Thomas P. Griesa, suppressing, as attorney-client communications, portions of conversations between the defendant Stern and another individual.

Reversed.

WILLIAM I. ARONWALD, Special Attorney, United States Department of Justice (Paul J. Curran, United States Attorney for the South-

ern District of New York, and John D. Gordan, III, Assistant United States Attorney, New York, N. Y., on the brief), *for Appellant.*

RAYMOND BERNHARD GRUNEWALD, New York, N.Y. (Joseph Beeler, Miami Beach, Florida, on the brief), *for Appellee.*

LUMBARD, *Circuit Judge:*

The government appeals from an order of the Southern District of New York which suppressed, as attorney-client communications, portions of conversations between defendant-appellee Irving Stern and Walter Bodenstein, particularly the material portion of the tape recording of a May 18, 1973 conversation between the two men.

A review of the record of the suppression hearing persuades us that there was no basis for concluding that an attorney-client relationship existed between Bodenstein and Stern at the time of the conversations in question. Nor at argument was counsel able to state what legal advice Stern was seeking. We therefore conclude as a matter of law that the trial court erred in holding the conversation privileged.

The facts are not seriously disputed. The defendant-appellee, Irving Stern, is Vice President of the International Amalgamated Meat Cutters Union. He is under indictment, filed March 21, 1974, for violations of the Racketeer Influenced Corrupt Organizations Act (18 U.S.C. §§ 1962 (c), (d)), the Taft-Hartley Act (29 U.S.C. §§ 186(a), (b)), and the Internal Revenue Code (26 U.S.C. §§ 7201, 7206(1)). Stern and his co-defendants are charged with conspiring to demand and accept, and demanding and

accepting, payments from employers of members of his union. The indictment further charges the defendants with failing to report the payments so received to the Internal Revenue Service. 26 U.S.C. §§ 7201, 7206(1).

Walter Bodenstein is a New York attorney who operates G.P. Sales, Inc., a meat merchandising company for Iowa Beef Processors ("IBP"), the largest meat packing company in the United States. Bodenstein and Stern were introduced eight to ten years ago by Moe Steinman, Bodenstein's father-in-law. Since then they have met occasionally in the course of business.

In June, 1972 Bodenstein, who was under a tax investigation, informed Stern that Stern's name had been mentioned in the course of the investigation. Stern asked that he be kept informed of developments. Over the summer and fall of 1972 the two remained in contact, Bodenstein keeping Stern informed about the investigation. Upon learning that the investigation related to IBP, Stern asked Bodenstein to represent him. Bodenstein declined to do so.

At this time Stern expressed a fear that his "stock speculations" might be disclosed as a result of the IBP investigation. Stern knew that Moe Steinman, Bodenstein's father-in-law, was a subject of an investigation into bribery of supermarket officials by IBP. Moe Steinman is named in Count 1 of the original indictment against Stern as the person through whom some of the alleged bribes were paid to Stern and his co-defendants.[1]

In January, 1973 Stern was subpoenaed to appear before the New York County Grand Jury, but declined to testify. Thereafter, Stern again met with Bodenstein. He told Bodenstein that in his conference at the County Dis-

[1] It should be noted, however, that these alleged payments were in no way related to IBP.

trict Attorney's Office there had been intimations of a connection between Steinman and himself, Stern. He again asked Bodenstein to represent him. Bodenstein again refused.

In March, 1973, Bodenstein and Steinman were indicted by a federal grand jury for filing false employers tax returns. Steinman, Currier Holman (an IBP official), and C.P. Sales, Inc. were also indicted federally and in the New York Supreme Court for other offenses.

On March 28, 1973, Stern received an IRS notification that his returns were being audited. In early April Stern spoke to Bodenstein about the audit. Bodenstein, unaware that Stern had already retained counsel and had so notified the IRS, recommended a lawyer.

In May Stern met with Bodenstein several times and discussed his fear of being unable to explain the source of $110,000 worth of bonds which he had posted as collateral for loans. Bodenstein was eager to make certain that the bonds were in no way related either to IBP or to his father-in-law, Steinman. Stern was similarly eager to steer clear of Steinman. Bodenstein taped the May 18, 1973 conversation, unbeknownst to Stern, to prove that neither he, IBP, nor Steinman was connected with the bonds.[2]

The conversation itself is the most convincing evidence that it occurred not in an attorney-client context, but in the context of two men under investigation trying to protect themselves from any nuances of corruption that might spill over from one investigation to the other. The major subjects interwoven in their conversation were the investiga-

[2] Bodenstein's decision to tape the May 18, 1973 conversation was prompted by the suggestion of Mr. Elkan Abramowitz, the attorney for Moe Steinman. Both the decision to tape the conversation and the conversation itself predate any cooperation by Bodenstein with the government.

tion of the meat and supermarket industry, Stern's bonds, and expert tax counsel.

At the outset of the conversation Bodenstein repeatedly questioned Stern in an attempt to elicit statements that Steinman had never paid Stern anything on behalf of IBP. Stern answered simply "Well, it's true."

Stern then interrupted to ask about "the George George thing" (George George, a supermarket official) and to say that "Nicky is solid" (Nicholas Abondolo, later to be one of Stern's co-defendants). George George had received some publicity relative to his appearance before a grand jury. The indictment which was filed on March 21, 1974 against Stern and his co-defendants alleges, as an overt act on the conspiracy count, that George George paid Abondolo $2,000. The district court denied the motion to suppress this portion of the conversation as privileged, but granted the motion as to the rest of the conversation.

Thereafter, in this May 18 conversation, Bodenstein elicited considerable detail from Stern about the bonds and the lenders with whom the bonds had been put up as collateral. At the end of this exchange Stern reiterated that these transactions had "absolutely nothing to do with Iowa [IBP]" and expressed the fear that "they're going to try to link me up with Moe [Steinman]. . . ."

Up to this point the conversation is characterized by a mutual fear that the investigation would reveal a tie-in between IBP and Stern.

Stern then questioned Bodenstein about names of expert tax counsel. Bodenstein's response was "I'll tell you what we did when we checked." Bodenstein proceeded to run through the names of several experts, among them Lou Bender, the tax lawyer whom Bodenstein and Stein-

man had retained. Finally, Bodenstein suggested "Why don't you have your lawyer get in touch with Bender." This exchange is consistent with a relationship of one man under investigation seeking advice and information from another who had been undergoing a similar investigation.

The balance of the conversation concerned Stern's fears of: (1) being linked to IBP ("The one thing I don't want to link is my situation with Moe and Iowa Beef. . . ."); (2) losing his lawyer if he consulted an outsider (["W]hat I'm most fearful of is that my guys find out anything about it. * * * I got nothing else, I lose them, I'm dead."); and (3) being unable to explain the source of the bonds (["U]nless they tell me something, I don't know what to do, they may try to give a rationale, some bullshit—of inheriting and something. I don't know. I don't know. There's got to be an answer. I just can't have a no answer.").[3]

In response to these expressions of Stern's fear, Bodenstein repeated his own belief that Stern was not involved with IBP, citing as support for this belief his knowledge of the grand jury testimony of "everybody at Iowa Beef," including his own. Bodenstein further offered to speak to Lou Bender, his tax expert, about the best way for Stern (who would remain anonymous) or his attorney to consult

[3] The government urges, as an additional ground for reversal, that if Stern was seeking legal advice, it was in the commission of a fraud on the United States government and, as such, was outside the privilege. There is no necessity for our reaching this question since we find that the conversation is not privileged in the first instance. Thus, while it is unclear what advice Stern hoped to receive from Bender, it is immaterial to Stern's relationship with Bodenstein.

It should be further noted that this court does not construe anything in the record as reflecting in any way on the integrity of Louis Bender.

with Bender without causing any "conflict." As Bodenstein put it, "your guy may be better speaking to Lou Bender than you. I don't know, let me talk to Lou. * * * You're not going to lose your guys, you know. They may go on a consulting basis to Lou. * * * Well let me see what Lou says. . . ."

Of course, Bodenstein and Stern were both under investigation; each was interested in protecting his own interests. Bodenstein wanted further assurances that Steinman had never bribed Stern on behalf of IBP. Stern wanted to be equally certain of not being linked with Steinman: "most important is to keep a separation." The government argues that Stern's motivation in contacting Bodenstein was to check the status of the investigation and to communicate his situation to Steinman indirectly. It is likely that this was part of Stern's motivation in speaking to Bodenstein.

Insofar as Stern confided in Bodenstein about the bonds, it was not, in the context of the conversation, with an eye to seeking legal guidance. Rather, it was in direct response to questions by Bodenstein, a potential co-defendant, whether he (Bodenstein), his father-in-law, or his business were likely to be implicated in any bribe payments to Stern.

Similarly, Stern's requests for help in choosing expert tax counsel were pleas of a frightened man looking for a solution to his problems from someone who might be implicated as a co-defendant if Stern failed to find an explanation for the bonds. Moreover, Bodenstein, having just undergone the ordeal of an investigation, was in a position to provide Stern with advice on securing expert tax counsel.

That Bodenstein was an attorney may well have been an additional factor which caused Stern to ask Bodenstein for

advice. However, it was Bodenstein's status as a potential co-defendant under investigation, not as an attorney, which was of paramount importance in their relationship.

The burden of establishing the existence of an attorney-client relationship rests on the claimant of the privilege. *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965). Thus, for Stern to have succeeded on his claim of privilege, he was obliged to prove that his relationship with Bodenstein fit within the privilege. According to Wigmore's formulation of the privilege which this circuit recognized in *United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961):

> "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal advisor, (8) except the protection be waived . . ." 8 Wigmore, Evidence § 2292 (McNaughton Rev. 1961).

Stern has failed to sustain his burden on both of the first two elements of the privilege. Not only has he failed to demonstrate that he was seeking legal advice from Bodenstein, but, even if names of experts are construed as legal advice, Stern has been unable to establish that he sought the advice from Bodenstein in his capacity as a legal advisor. Rather, as has been amply demonstrated, he sought the advice from a potential codefendant, from a fellow subject of investigation, from a veteran of an IRS audit. Given that there is little dispute over the material evidentiary facts, we conclude as a matter of law that there was no attorney-client relationship between Bodenstein and Stern; therefore, their conversations are not privileged.

Nor can the district court's ruling be sustained on the alternative ground that Bodenstein was Stern's agent in dealing with attorney Bender and consequently the communications were privileged.

Although the record below is somewhat ambiguous, it appears that the district court abandoned the agency theory as a basis for its final holding. Instead, it found that "Bodenstein was more than merely an intermediary" and that Stern would not have confided in him had Bodenstein not been "someone who could have the judgments associated with attorneys." To the extent that this constitutes, as it appears to, an abandonment of the agency rationale in favor of a finding of an attorney-client relationship between Bodenstein and Stern, then our determination that no such relationship existed disposes of the problem and it is unnecessary for us to evaluate the agency theory.

To the extent that the district court found that Bodenstein would never have been employed as an agent for communication with Bender had he not had some legal knowledge, that finding was clearly erroneous.

While it was Stern who introduced the subject of tax experts during the May 18 conversation, it was Bodenstein who offered to contact Bender, his own attorney, on Stern's behalf. Moreover, this offer was made well after Stern had already poured out considerable detail about the bonds. Both of these facts are inconsistent with the notion that Stern confided in Bodenstein with an eye to Bodenstein's serving as an agent in communicating with Bender. Certainly Bodenstein's offer to contact Bender was the outcome of the conversation, but it was clearly not the purpose for which Stern's revelations about the bonds were made. Because the agency theory is so decisively contradicted by

the conversation itself, it is unnecessary for us to pass on its legal merits.[4]

For the foregoing reasons we find that no attorney-client relationship existed between Bodenstein and Stern. Stern's testimony that such a relationship existed in his mind is contrary to the facts and circumstances and the inferences to be drawn from them. The district court erred as a matter of law in concluding that there was an attorney-client privilege which protected the suppressed portion of the conversation from disclosure.

The order of the district court suppressing portions of the conversations between Bodenstein and Stern is reversed.

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[4] See generally *Blankenship* v. *Rowntree*, 219 F.2d 597 (10th Cir. 1955) (holding that a memorandum prepared by a client and delivered to his attorney by an agent of the client was a privileged communication); *United States* v. *Andreadis*, 234 F. Supp. 341, 345 n. 3 (E.D.N.Y. 1964) (suggesting that the presence of an agent of the client during an otherwise privileged conversation with an attorney may not destroy the privilege where it is a prior agency such a secretary, nurse or partner); 8 Wigmore § 2311 (communications in the presence of a third party who is not an agent of either the attorney or the client destroys the privilege), § 2317(1) (communications by an agent of the client to the attorney are privileged) (McNaughton rev. 1961).

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of April, one thousand nine hundred and seventy-five.

Present:

HON. J. EDWARD LUMBARD,
HON. HENRY J. FRIENDLY,
HON. MURRAY I. GURFEIN,

Circuit Judges.

74-2522

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

IRVING STERN, MOS FLISS, NICHOLAS ABONDOLA,

Defendants,

IRVING STERN,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

Denial of Stay of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of May, one thousand nine hundred and seventy-five.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

IRVING STERN, MOE FLISS, NICHOLAS ABONDOLA,

Defendants,

IRVING STERN,

Defendant-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated April 22, 1975 to stay mandate pending petition for writ of certiorari to the Supreme Court of the United States be and it hereby is DENIED.

J. Edward Lumbard

.....

J. EDWARD LUMBARD

Murray I. Gurfein

.....

MURRAY I. GURFEIN

Henry J. Friendly per M.I.G.

.....

HENRY J. FRIENDLY per M.I.G.

Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1415

IRVING STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the district court's pretrial order suppressing, as privileged, portions of conversations between himself and an attorney.

Petitioner, vice president of the International Amalgamated Meat Cutters Union, is under indictment in the United States District Court for the Southern District of New York for conspiring to demand and accept, and demanding and accepting, payments from employers of members of his union, in violation of the Organized Crime Control Act of 1970, 18 U.S.C. 1962(c), (d), the Taft-Hartley Act, 29 U.S.C. 186(a), (b), and the Internal Revenue Code, 26 U.S.C. 7201, 7206(1), and for failing to report the payments so received on his tax returns, in violation of 26 U.S.C. 7201, 7206(1).

After a pretrial evidentiary hearing, the district court granted petitioner's motion to suppress, on grounds of attorney-client privilege, portions of conversations between himself and Walter Bodenstein, particularly the material part of a May 18, 1973, meeting between the two men that Bodenstein tape-recorded without petitioner's knowledge. On the government's appeal, the court of appeals reversed (Pet. App. 1a-10a), ruling that the record of the suppression hearing revealed "no basis for concluding that an attorney-client relationship exisited between Bodenstein and [petitioner] * * * at the time of the conversations in question," and that the district court erred as a matter of law in holding the communications to be privileged (*id.* at 2a).

The relevant facts are detailed in the comprehensive opinion of the court of appeals (Pet. App. 3a-7a), upon which we rely. Petitioner is vice president of the Meat Cutters Union. Walter Bodenstein is a New York attorney who operates G.P. Sales, Inc., a meat merchandising company for Iowa Beef Processors ("IBP"), the largest meat packing company in the United States. Bodenstein and petitioner were introduced some years ago by Moe Steinman, Bodenstein's father-in-law.

In June 1972 Bodenstein, who was under investigation by the Internal Revenue Service for income tax violations, told petitioner that petitioner's name had been mentioned in the course of the investigation. Petitioner asked Bodenstein to keep him informed of developments. During the summer and fall of 1972, Bodenstein did so. Upon learning that the investigation related to IBP, petitioner asked Bodenstein to represent him, but Bodenstein declined. At this time petitioner, who knew that Steinman was a subject of

an investigation into IBP's bribery of supermarket officials, expressed fear that his "stock speculations" might be disclosed as a result of the IBP investigation.[1]

In January 1973, petitioner appeared pursuant to subpoena before a New York County grand jury, but he declined to testify. Thereafter, petitioner again met with Bodenstein, told him that the state district attorney's staff had intimated that a connection existed between Steinman and petitioner, and asked Bodenstein to represent him. Bodenstein once again refused.

In March 1973, Bodenstein and Steinman were indicted by a federal grand jury for filing false employers' tax returns. Steinman, Currier Holman (an IBP official), and G.P. Sales, Inc., were also indicted in both federal and state courts for other offenses. In late March 1973, IRS notified petitioner that it was auditing his returns. In early April, petitioner spoke about the audit to Bodenstein, who, unaware that petitioner had already retained counsel and had so notified the IRS, recommended a lawyer.

In May 1973, petitioner met with Bodenstein several times and discussed his fear of being unable to explain the source of $110,000 worth of bonds that he had posted as collateral for loans. Bodenstein was eager to make certain that the bonds were in no way related either to IBP or to his father-in-law Steinman and petitioner was eager to avoid involvement with Steinman. Bodenstein tape-recorded this conversation, without petitioner's knowledge, to prove that neither he, IBP, nor Steinman was connected with the bonds.

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[1]Steinman is named in the indictment as a person through whom some of the alleged bribes were paid to petitioner and his co-defendants.

At the outset of the conversation, Bodenstein repeatedly questioned petitioner in an attempt to elicit statements that Steinman had never paid petitioner anything on behalf of IBP. Petitioner answered simply, "Well, it's true." Petitioner then asked about "the George George thing" concerning a supermarket official by that name and remarked that "Nicky is solid" (referring to Nicholas Abondolo, later named as one of petitioner's co-defendants).[2]

Later in the conversation, Bodenstein elicited considerable detail from petitioner about the bonds and the lenders with whom they had been put up as collateral. Petitioner reiterated that these transactions had "absolutely nothing to do with Iowa [Beef Processors]" and expressed the fear that "they're going to try to link me up with Moe [Steinman]."

Petitioner then questioned Bodenstein about names of expert tax counsel. Bodenstein responded, "I'll tell you what we did when we checked," and then mentioned the names of several experts, including Lou Bender, the tax lawyer whom Bodenstein and Steinman had retained. Finally, Bodenstein suggested, "[w]hy don't you have your lawyer get in touch with Bender."

The balance of the conversation (see Pet. App. 6a) concerned petitioner's fears of being linked to IBP, losing his lawyer if he consulted an outsider, and being unable to explain the source of the bonds.

In response to petitioner's expressions of fear, Bodenstein repeated his own belief that petitioner was not involved with IBP, citing his knowledge of the grand jury testimony of "everybody at IOWA BEEF," including

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[2]George's appearance before a grand jury had received publicity. The indictment alleges as an overt act on a conspiracy count that George paid Abondolo $2,000. The district court rejected petitioner's contention that this portion of the conversation was privileged.

his own. Bodenstein further offered to speak to Lou Bender, his tax expert, about the best way for petitioner or his attorney to consult with Bender without causing any "conflict." As Bodenstein put it, "your guy may be better speaking to LOU BENDER than you. I don't know, let me talk to LOU * * * You're not going to lose your guys, you know. They may go on a consulting basis to LOU. * * * Well let me see what LOU says * * *."

1. The decision below correctly applies settled principles concerning privileged communications to the particular facts of this case and does not warrant further review. A person asserting the attorney-client privilege must demonstrate, among other things, that he was seeking legal advise from an attorney in his capacity as a professional legal advisor. *United States* v. *Kovel*, 296 F.2d 918, 921 (C.A. 2). Here, as the court of appeals held, petitioner failed to make such a showing.

As the court of appeals observed (Pet. App. 4a), the conversations between petitioner and Bodenstein at issue "occurred not in an attorney-client context, but in the context of two men under investigation trying to protect themselves from any nuances of corruption that might spill over from one investigation to the other." The relationship between petitioner and Bodenstein was, as the court of appeals further noted (*id.* at 6a), that of "one man under investigation seeking advice and information from another who had been undergoing a similar investigation." Their conversations were characterized by a mutual fear that the investigation would reveal a tie-in between petitioner and IBP, and each was preoccupied with protecting his own interests. Bodenstein wanted further assurances that Steinman had never bribed petitioner on behalf of IBP, and petitioner, who also

did not want to be linked with Steinman, stressed that "most important is to keep a separation" (*id.* at 7a). Petitioner's purpose in contacting Bodenstein was to check the status of the investigation and to communicate his situation to Steinman indirectly.

The court of appeals properly concluded that, insofar as petitioner confided in Bodenstein about the bonds, "it was not * * * with an eye to seeking legal guidance" (*ibid.*). Rather, it was in direct response to questions by Bodenstein, a fellow subject of investigation, concerning whether Bodenstein, his father-in-law, or his business was likely to be implicated in any bribe payments made to petitioner. That petitioner could not reasonably have thought he was consulting Bodenstein as an attorney is demonstrated further by the fact that Bodenstein had on several prior occasions expressly refused to represent petitioner.

Similarly, petitioner's requests for help in choosing expert tax counsel were the pleas of a frightened man looking for a solution to his problems from someone who might be implicated if petitioner failed to come up with an explanation for the bonds. Moreover, having just undergone the ordeal of a tax investigation, Bodenstein was in a position to provide petitioner with advice on securing expert tax counsel. That Bodenstein was an attorney may have been an additional factor that caused petitioner to ask him for advice, but, as the court of appeals correctly held, it was Bodenstein's status as a target of the investigation, not as an attorney, that was of paramount importance in their relationship (*id.* at 8a).[3]

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[3]Petitioner disputes (Pet. 22-23) the court of appeals' reference to Bodenstein as a "potential co-defendant" (Pet. App. 7a-8a), but that characterization was entirely appropriate. Bodenstein himself recognized that he might be implicated in bribe payments to petitioner, as evidenced by his efforts to elicit exculpatory statements from petitioner during the secretly tape-recorded conversation.

2. Petitioner also argues (Pet. 17) that the communications were privileged because Bodenstein was his agent in dealing with attorney Bender. The agency theory, however, is contradicted by the conversation itself, as the court of appeals properly noted (Pet. App. 9a):

> While it was [petitioner] who introduced the subject of tax experts during the May 18 conversation, it was Bodenstein who offered to contact Bender, his own attorney, on [petitioner's] behalf. Moreover, this offer was made well after [petitioner] had already poured out considerable detail about the bonds. Both of these facts are inconsistent with the notion that [petitioner] confided in Bodenstein with an eye to Bodenstein's serving as an agent in communicating with Bender. Certainly Bodenstein's offer to contact Bender was the outcome of the conversation, but it was clearly not the purpose for which [petitioner's] revelations about the bonds were made.

3. Petitioner further contends that the court of appeals improperly usurped the fact-finding function of the district court. However, as the court of appeals noted (Pet. App. 2a), the material facts were undisputed, and it merely corrected the district court's erroneous legal ruling that the communications at issue were privileged (*id.* at 10a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.